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Federal Supplemental Enforcement Jurisdiction

Susan M. Glenn

FEDERAL SUPPLEMENTAL ENFORCEMENT JURISDICTION

I. INTRODUCTION

Since the United States Supreme Court's landmark decisions on pendent and ancillary jurisdiction, *United Mine Workers v. Gibbs*[1] and *Owen Equipment & Erection Co. v. Kroger*,[2] some commentators and judges have inferred that the Court is moving toward a "unified theory" by which all questions of pendent and ancillary jurisdiction can be analyzed.[3] According to these observers, little substantive difference exists between the modern doctrines of pendent and ancillary jurisdiction,[4] which permit "a federal court to exercise jurisdiction over a party or claim normally outside of federal judicial power."[5] Conse-

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1. 383 U.S. 715 (1966).

2. 437 U.S. 365 (1978).

3. Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935, 1938 (1982); *see* Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1401 (1983)[hereinafter Matasar, *"One Constitutional Case"*]; Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983) [hereinafter Matasar, *Supplemental Jurisdiction*]; Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263 (1975). *See also* Ambromovage v. United Mine Workers, 726 F.2d 972, 989 n.49 (3d Cir. 1984) (Judge Becker noted that "the general approach of [Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935 (1982) is] an intelligent way of systematizing the decisions in this area.").

Congress impliedly adopted this view of pendent and ancillary jurisdiction in recent legislation intended to overrule Finley v. United States, 109 S. Ct. 2003 (1989). *See* S. Res. 2648, 101st Cong., 2d Sess., 136 CONG. REC. 17,580-81 (1990). The new statute, § 1367 of Title 28, provides, among other things, that:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C.A. § 1367(a) (West Supp. 1991).

4. *See* Matasar, *Supplemental Jurisdiction*, *supra* note 3, at 105.

5. *Id.* at 104 n.1; *see also* Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34 n.1 (distinguishes the two as follows: "[P]endent jurisdiction is exercised over nonfederal claims asserted by a plaintiff as part of a federal question suit. Ancillary jurisdiction involves claim or party joinder instituted by a party

quently, commentators view these two doctrines as theoretically similar and have articulated a single test, or "unified theory," by which any question of pendent or ancillary jurisdiction can be analyzed.[6]

This test may be a valid way to analyze the typical pendent and ancillary questions presented by *Gibbs* and *Kroger*. It fails, however, to take into account the other types of jurisdictional issues that courts also label ancillary.[7] For example, under the traditional view, the power of federal courts to enforce their judgments falls within their ancillary jurisdiction.[8] This type of ancillary jurisdiction, however, raises issues that differ from those raised by claims that are asserted directly in the primary action. As long as the judgment creditor seeks to bring only the judgment debtor before the court in an enforcement proceeding, the federal court that rendered the judgment undoubtedly has subject matter jurisdiction over that proceeding.[9] A different question arises, however, when the judgment creditor seeks to satisfy the judgment by bringing into federal court a nondiverse third party that was a stranger to the original action.[10] Does a court have subject mat-

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or nonparty.").

6. *See* Note, *supra* note 3, at 1953. The test consists of three steps and requires the court to (1) determine whether the ancillary and principal claims derive from a "common nucleus of operative fact," (2) examine "the difference between joining a claim and adding a party," examine the "posture" in which the ancillary claim is asserted, and measure that posture against the jurisdictional statute under which the case is brought to see if the exercise of jurisdiction would violate federal policy, and (3) weigh prudential factors such as convenience, fairness, and judicial economy to determine whether the exercise of jurisdiction is proper. *Id.*

7. *See, e.g.*, Root v. Woolworth, 150 U.S. 401 (1893) (supplemental and ancillary bill to enforce previous judgment of federal court within court's jurisdiction, without regard to citizenship of the parties); O'Brien County v. Brown, 18 F. Cas. 523 (C.C.D. Iowa 1871) (No. 10,399) (court has jurisdiction of bill in equity against assignee of judgment creditor to set aside judgment for fraud, even though parties are from same state, because the bill is a continuation of original suit). Because the Federal Rules of Civil Procedure now solve most of the problems that, before the Rules, were addressed by a court's ancillary powers, these other uses of a court's ancillary power may appear minor from a twentieth-century perspective. For example, under equity practice, courts could entertain supplemental bills that had the effect of amending the pleadings. The Rules have incorporated this practice and simplified it. *See* FED. R. CIV. P. 15.

8. *See* Dugas v. American Sur. Co., 300 U.S. 414, 428 (1937); *Root*, 150 U.S. at 410-11; Labette County Comm'rs v. United States *ex rel.* Moulton, 112 U.S. 217, 221 (1884).

9. *See* Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 171-73 (1867).

10. Three recent federal appellate court decisions illustrate the dispute in this area. *See* Argento v. Village of Melrose Park, 838 F.2d 1483 (7th Cir. 1988); Skevofilax v. Quigley, 810 F.2d 378 (3d Cir.), *cert. denied*, 481 U.S. 1029 (1987); Berry v. McLemore, 795 F.2d 452 (5th Cir. 1986). In each of these cases the third party who, according to the judgment creditor, had a duty to pay the judgment, challenged the jurisdiction of the federal court to enforce a judgment that it had previously rendered. The courts in *Argento* and *Skevofilax* found that the federal courts do have jurisdiction to enforce

ter jurisdiction over enforcement actions which include nondiverse, third-party strangers to the original action? If so, in what situations is this jurisdiction proper?[11]

When applied to enforcement questions, the "unified theory" fails to take into account the special issues raised by the application of ancillary jurisdiction in enforcement proceedings. Analyzing the "common nucleus of operative facts,"[12] examining the posture of the claim,

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their judgments in this situation, but the court in *Berry* ruled that it does not. *See infra* notes 175-208 and accompanying text.

11. Pursuant to Rule 69 of the Federal Rules of Civil Procedure, to enforce its judgment a Federal Court uses the procedure of the state in which it sits. FED. R. CIV. P. 69(a). Most states provide for supplementary proceedings that allow a judgment creditor to reach those assets of a judgment debtor that are in the hands of a third party. *See, e.g.*, S.C. CODE ANN. §§ 15-39-10 to -900 (Law. Co-op. 1976). These supplementary proceedings are a substitute for the creditor's bill in equity. *See* Fox v. Capital Co., 299 U.S. 105, 107 (1936).

Most states also provide for postjudgment garnishment to allow a judgment creditor to reach the assets of the judgment debtor that are in the hands of third persons. *See* C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES § 451 (1885). The theory of postjudgment garnishment generally is the same as the theory of supplementary proceedings and creditor's bills. *See* Pratt v. Albright, 9 F. 634, 639 (C.C.E.D. Wis. 1881) (compares garnishment to other supplementary proceedings and notes that garnishment actions should be ancillary because a creditor's bill is ancillary). *See infra* note 48. Some difference of opinion exists, however, about whether or not garnishment is an ancillary remedy. *Compare* London & Lancashire Indem. Co. v. Courtney, 106 F.2d 277 (10th Cir. 1939) (construes Oklahoma law to find a writ of garnishment to be an independent action) *with* American Auto. Ins. Co. v. Freundt, 103 F.2d 613 (7th Cir. 1939) (construes Illinois law to find garnishment to be an ancillary proceeding). As argued below, whether state law characterizes an action as ancillary should not bind a federal court with respect to its jurisdiction. *See infra* notes 136-37. Because postjudgment garnishment serves the same function as supplementary proceedings, a writ of garnishment filed to enforce a judgment should be ancillary to that action.

Because the Rules of Civil Procedure cannot expand or limit the jurisdiction of the federal courts, whether the rules provide a way to reach the assets of a judgment debtor in the hands of a third party is a separate issue from whether a federal court can properly take jurisdiction over the claim against that third party. *See* FED. R. CIV. P. 82. However, the procedural issue is often confused with the jurisdictional issue. *See, e.g.*, *Argento*, 838 F.2d at 1489; *Skevofilax*, 810 F.2d at 390 (J. Stapleton, dissenting). *See infra* notes 191-206 and accompanying text. This Note addresses the jurisdictional question and will only discuss the procedural issue as it impacts the various decisions of the federal courts.

12. The Supreme Court adopted this test, which is traditionally applied to pendent jurisdiction questions, to analyze the ancillary question presented in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). The Court in *Kroger* noted that pendent and ancillary questions are "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?" *Id.* at 370. *See also* Matasar, *Supplemental Jurisdiction*, *supra* note 3, at 150 (several courts and commentators have stated that *Gibbs* sets forth constitutional limits for both ancillary and pendent jurisdiction); Comment, *supra* note 3, at 1280.

and weighing the prudential factors, as the unified theory requires, ignores the distinction between the types of claims brought in a primary action and those brought in an enforcement action. For example, a tort claim that results in an award of money damages is completely different from a claim against an insurer who owes a contractual duty to pay those damages. Thus, the "common nucleus of operative facts" test has little application in the typical enforcement context.[13] Moreover, the test gives only slight weight to the federal courts' fundamental interest in enforcing their own judgments.[14]

This Note argues that enforcement jurisdiction is not "ancillary" as that term is usually defined, and federal courts should not use a unified theory analysis to determine enforcement jurisdiction questions. Instead, enforcement jurisdiction questions should be analyzed according to legal principles applicable to this specific area of federal subject matter jurisdiction.[15] According to these principles, simply stated, federal jurisdiction over an enforcement proceeding is proper when the proceeding is merely a continuation of the primary action.[16] In other words, when the judgment creditor seeks to reach assets of the judgment debtor, jurisdiction is proper even if a third-party stranger to the judgment who has possession of those assets must be brought into the proceedings.

This rule's simplicity is deceptive, however, and its application has varied widely. For example, because the Federal Rules of Civil Procedure incorporate state law for purposes of enforcing a judgment,[17] some courts rely on state law to determine whether an enforcement

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13. *Cf.* Matasar, *"One Constitutional Case," supra* note 3, at 1453-54 (argues that the *Gibbs* fact-relatedness test is inadequate even when applied to the primary action, and that the policies of *Gibbs* are better served by a "same transaction or occurrence" or a "logical relationship" test).

14. As the Supreme Court noted in Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51 (1825):

> The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the laws of the United States. The authority to carry into complete effect the judgments of the Courts, necessarily results, by implication, from the power to ordain and establish such Courts.

Id. at 53.

15. Because in the nineteenth century the term "ancillary" referred, in part, to the power of a court to enforce and regulate its judgments, the term "ancillary" will be used in this Note to refer to enforcement jurisdiction questions. However, today the court's power to enforce its judgments is more appropriately seen as falling within its "enforcement jurisdiction," because the term "ancillary" has lost its nineteenth-century meaning.

16. *See infra* notes 138-46 and accompanying text.

17. *See* FED. R. CIV. P. 69(a).

proceeding is a continuation of the primary action.[18] Other courts have developed a bright-line rule that all enforcement actions of a certain type are independent and, hence, not continuations of the primary actions.[19] As this Note will show, neither approach is correct.[20]

This rule and its meaning can be understood only in the context of nineteenth-century equity practice. The nineteenth-century federal courts, applying the tenets of equity to the problems posed by their limited jurisdiction, created the doctrine of ancillary jurisdiction. Enforcement jurisdiction was one aspect of this doctrine.[21] To place enforcement jurisdiction in its proper context, therefore, Part II of this Note will review nineteenth-century federal equity practice, how that practice affected the earlier uses of the federal courts' ancillary powers, and how it provided a theoretical basis for enforcement jurisdiction. Part III will propose a method for analyzing enforcement questions and contrast that method with the modern doctrine of ancillary jurisdiction. Part IV applies this analytical method to three recent appellate court decisions[22] to show its usefulness in resolving enforcement jurisdiction questions.

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18. *See, e.g.*, Argento v. Village of Melrose Park, 838 F.2d 1483 (7th Cir. 1988) (jurisdiction proper because Illinois law allowed statute in question to be enforced in same action).

19. *See, e.g.*, Berry v. McLemore, 795 F.2d 452 (5th Cir. 1986) (no jurisdiction because garnishment actions are separate and independent under Fifth Circuit precedent and no independent basis for jurisdiction exists).

20. *See infra* notes 130-37 and accompanying text.

21. When viewed in the context of equitable procedure, this doctrine is more consistent than some authorities suggest. *See, e.g.*, 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3523 (1984) [hereinafter WRIGHT & MILLER] (calling the concept "ill-defined"). Since the merger of law and equity and the promulgation of the Federal Rules of Civil Procedure, ancillary jurisdiction is only indirectly based on equitable concepts. The modern doctrine focuses on (1) the factual relationship of the ancillary claim to the primary action, (2) its posture before the court, and (3) the discretionary policies articulated in United Mine Workers v. Gibbs, 383 U.S. 715 (1966) and Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). Many of the Rules are derived from the former equity rules, however, and modern ancillary jurisdiction is an attempt to "balance federal subject matter jurisdiction requirements with the liberal provisions of the rules as to joinder." 13 WRIGHT & MILLER, *supra*, § 3523, at 95-96. Thus the modern concept of ancillary jurisdiction still has its roots in equity. *See* Matasar, *"One Constitutional Case," supra* note 3, at 1484-86 n.387.

22. The three cases include: *Argento*, 838 F.2d at 1483; Skevofilax v. Quigley, 810 F.2d 378 (3d Cir.), *cert. denied*, 481 U.S. 1029 (1987); *Berry*, 795 F.2d at 452. *See infra* notes 179-216 and accompanying text.

II. THE EQUITABLE BASIS OF ANCILLARY JURISDICTION

A. Federal Equity Practice

Article III of the Constitution and the first Judiciary Act expressly maintained the distinction between law and equity.[23] Moreover, although Congress initially provided that the procedure of the federal courts sitting in law should conform as closely as possible to the procedure of the courts in the states in which they sat,[24] the rule was different when the federal courts sat in equity. Procedure in equity was uniform throughout the federal judicial system. The precedents of the English Chancery Courts, modified by the equitable rules promulgated by the Supreme Court, governed equity proceedings.[25] As a result, if the English Chancery could provide relief in a certain situation, then the federal courts could provide similar relief.[26]

This relief was, theoretically at least, very broad.[27] According to Joseph Story's *Commentaries on Equity Jurisprudence*, the nature of equity jurisprudence is understood best if it is distinguished from legal jurisprudence. As Story noted, the common-law courts of the time could hear only "certain prescribed forms of action, to which the party [had to] resort to furnish him a remedy."[28] Therefore, if the existing prescribed forms were not appropriate for a particular case, the party was without remedy at law.[29] In such cases the courts of equity could be flexible:

> [Courts of equity] may adjust their decrees, so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain, and

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23. Article III, section 2 provides: "The judicial Power shall extend to all cases, in Law and Equity." U.S. CONST. art. III, § 2.

Section 16 of the Judiciary Act of 1789 provides "[t]hat suits in equity shall not be sustained in either of the courts of the United States, in any case where [a] plain, adequate and complete remedy may be had at law." Judiciary Act of September 24, 1789, ch. 28, § 16, 1 Stat. 73, 82 (1789).

24. Process Act of September 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (1789).

25. *Id.* at 93-94 (reaffirmed and amended to allow Supreme Court to regulate procedure in equity by rule in Process Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792)). *See also* Matasar, *"One Constitutional Case," supra* note 3, at 1484, 1486 n.387 (argues that current practice is "not an unacceptable alteration of the practice existing at the time of the framing of the Constitution" and the adoption of the Process Act of September 29, 1789 demonstrated Congress's support of the potentially broad uses of equitable procedure).

26. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 564 (1851).

27. *See* Matasar, *"One Constitutional Case," supra* note 3, at 1484 n.387.

28. 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 26, at 26 (2d ed. 1839).

29. *Id.*

> model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. Nay, more; they can bring before them all parties interested in the subject matter, and adjust the rights of all, however numerous; whereas Courts of Common Law are compelled to limit their inquiry to the very parties in the litigation before them . . . .[30]

In fact, courts of equity required that any bill presented "be so framed as to afford ground for such a decision upon the whole matter, at one and the same time, as may, as far as possible, prevent future litigation concerning it."[31] To achieve this end, equitable procedure provided for joinder of claims and parties,[32] cross-bills,[33] bills of interpleader,[34] bills of discovery,[35] bills of revivor,[36] and supplemental bills.[37] While the objective of common-law procedure was the reduction of the controversy to a single legal or factual issue between only two parties, the objective of equitable procedure was the complete and just determination of the controversy in one action.[38]

The policies of equity thus were to do complete justice in a single action and avoid multiple lawsuits. However, these policies often conflicted with the limited jurisdiction of the federal courts. To resolve this conflict, the federal courts turned to equitable jurisdiction and equitable procedure. Equitable jurisdiction gave the court the power to hear auxiliary bills, which allowed a court of equity to aid parties to an action at law.[39] Equitable procedure provided the device known as the dependent supplemental bill, by which a court of equity could adjudicate claims related to the primary action.[40] Courts often confused these two concepts because they viewed auxiliary bills as dependent by definition. Auxiliary bills and supplemental bills were, however, technically distinct, with distinct applications.[41] These applications provided ways to balance the inclusive policies of equity with the limitations on federal subject matter jurisdiction.

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30. *Id.* § 28, at 27.
31. 1 E. DANIELL, DANIELL'S CHANCERY PRACTICE 379 (Perkins First Am. ed. 1846).
32. *See id.* at 240-41, 379-80.
33. 3 E. DANIELL, *supra* note 31, at 1742-52.
34. *Id.* at 1753-68.
35. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1483, at 700-02 (1836).
36. 3 E. DANIELL, *supra* note 31, at 1693-1717.
37. *Id.* at 1653-85.
38. *See* H. MCCLINTOCK, HANDBOOK OF EQUITY §§ 8-9, at 11 (1936).
39. *See infra* notes 44-53 and accompanying text.
40. *See infra* notes 54-72 and accompanying text.
41. *See infra* notes 73-77 and accompanying text.

1. *Jurisdiction in Equity*

As Story noted, equity jurisdiction was confined to situations in which "a plain, adequate, and complete remedy cannot be had in the Courts of Common Law."[42] This jurisdiction was even more inclusive than this phrase implies:

> The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in Equity. And it must be complete; that is, it must attain the full end and justice of the case.[43]

Because of the limitations of legal procedure, therefore, courts of equity could provide relief in several different categories of cases. Equitable jurisdiction was "sometimes concurrent with the jurisdiction of a [c]ourt of law; it [was] sometimes exclusive of it; and it [was] sometimes auxiliary to it."[44] By means of the latter, equity could in some cases assist parties to actions at law.[45]

A court of equity could exercise its auxiliary jurisdiction to assist a court of law "in a variety of cases, in which the administration of justice could not otherwise be usefully or successfully attained."[46] For example, the chancellor could permit bills for discovery so that, contrary to legal procedural rules, parties to a suit at common law would be required to produce documents and testimony to help the plaintiff prove facts known only to the defendant.[47] Also, if a party obtained a

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42. 1 J. STORY, *supra* note 28, § 33, at 32 (footnote omitted). *See also* Judiciary Act of September 24, 1789, ch. 20, § 16, 1 Stat. 73, 82 (1789) ("[S]uits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete relief can be had at law.").

43. 1 J. STORY, *supra* note 28, § 33, at 32 (footnote omitted).

44. *Id.* at 33 (footnote omitted).

45. 2 J. STORY, *supra* note 35, §§ 1480-1481, at 699. Story also refers to this type of jurisdiction as supplemental or assistant jurisdiction. *See* 1 J. STORY, *supra* note 28, § 75, at 92. The term "supplemental" in this context apparently means "ancillary." The use of the term "supplemental" to refer to this type of jurisdiction can lead to confusion because equitable practice provided for a type of bill known as a supplemental bill. *See infra* note 53 and accompanying text. Technically, a party filed an auxiliary bill in aid of an action at law and filed a supplemental bill in aid of an action in equity. *See supra* notes 39-40 and accompanying text. In general, though, the word "supplemental" could encompass any bill filed as an adjunct to a primary action, and thus the words "supplemental" and "supplementary" were sometimes used to refer to matters that were considered auxiliary in the strict sense of equitable procedure.

46. 2 J. STORY, *supra* note 35, § 1481, at 69.

47. *Id.* § 1483, at 700. Section 15 of the Judiciary Act of 1789 provided that the federal courts sitting at law had the same power to entertain bills of discovery as provided "by the ordinary rules of proceeding in chancery." Judiciary Act of September 24,

common-law judgment that he could not satisfy by legal procedures, he could file a creditor's bill in equity to discover and reach equitable assets of the debtor or to set aside any fraudulent conveyances made by the debtor.[48] Moreover, to prevent injustice, a bill in equity could be filed to restrain or regulate a judgment in a suit at law[49] or to allow a party to assert an equitable defense that the party could not have asserted in the suit at law.[50]

These auxiliary bills were, by definition, dependent on the underlying legal action, because equity's jurisdiction to aid an action at law did not exist until the court had a properly filed legal action before it.[51] Therefore, the court viewed auxiliary bills as a continuation of the underlying legal action,[52] and the court's jurisdiction over such a bill depended on its jurisdiction over the underlying legal action. This auxiliary power of a court of equity was one source of the nineteenth-century doctrine of ancillary jurisdiction.[53]

2. *Equitable Procedure*

A second source of ancillary jurisdiction is found in the equitable concept of the dependent bill. Although equitable procedure was flexible, it was complex and technical. Bills were generally divided into two classes. First, "Original Bills . . . relate[d] to some matter not before litigated in the [c]ourt by the same persons, standing in the same interests."[54] Second, bills not original, also called dependent bills, added to or continued an original bill and related to some matter already litigated by the same parties.[55] Moreover, this last class included bills "brought for the purpose of cross litigation, or of controverting, or suspending, or reversing some decree or order of the Court, or of obtaining

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1789, ch. 20, 1 Stat. 73, 82 (1789). Courts of equity could also preserve testimony for use in a court of law. 2 J. STORY, *supra* note 35, §§ 1505-1512, at 718-23.

48. *See* H. MCCLINTOCK, *supra* note 38, § 203, at 358. *See also* Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329, 332-33 (1887) (court had jurisdiction over creditor's bill to set aside fraudulent conveyance because action was ancillary to action at law and, thus, could be maintained regardless of citizenship of parties); Marsh v. Burroughs, 16 F. Cas. 800, 802 (C.C.S.D. Ga. 1871) (No. 9,112) ("A judgment creditor, who has exhausted his legal remedy, may pursue, in a court of equity, any equitable interest, trust or demand of his debtor, in whosesoever hands it may be.").

49. *See, e.g.*, Freeman v. Howe, 65 U.S. (24 How.) 450 (1861).

50. *See, e.g.*, Johnson v. Christian, 125 U.S. 642, 645-46 (1888).

51. A dependent bill in equity was one that related to an already existing original bill in equity. See *infra* notes 54-55 and accompanying text.

52. *See, e.g.*, Hatch v. Dorr, 11 F. Cas. 805, 806 (C.C.D. Mich. 1846) (No. 6,206).

53. *See infra* notes 102-12 and accompanying text.

54. 1 J. Story, *supra* note 28, § 16, at 15 (footnote omitted).

55. *Id.*

the benefit of a former decree, or of carrying it into execution . . . ."[56] These bills had some of the qualities of original bills and some of the qualities of dependent bills. Furthermore, if the bills rested on new facts or required additional parties to be brought before the court, they were called supplemental bills, a subclass of dependent bills.[57]

In equity, a party filed a supplemental bill to either cure a defect in the original pleadings or add newly discovered material or parties whose relationship to the controversy came to light after the pleadings had been filed.[58] A party could file a supplemental bill any time after filing the suit, even after the court entered its decree.[59] A party could bring a postdecree supplemental bill to request the court to enforce or clarify the decree.[60] The bills could bring new parties, including defendants, before the court[61] and request the court to "give directions, which were not prayed by the original bill, but which the result of the proceedings under the decree [had] rendered proper."[62] However, a postdecree supplemental bill had to strictly aid the action already taken by the court; it could not "vary the principle of the decree," but was limited to supplying any omission "in the decree or in the proceedings, so as to enable the Court to give full effect to its decision."[63]

To further complicate matters, supplemental material in some cases had to be filed by means of "an original bill in the nature of a supplemental bill."[64] Equity distinguished those situations in which the plaintiff's interest was "transmitted to another person coming in under the *same* title"[65] from those in which the plaintiff's interest was completely vested in another, as in a bankruptcy proceeding or after an assignment of interest.[66] In the former case, a supplemental bill was sufficient; in the latter, the court required an original bill in the nature of a supplementary bill.[67] If a party had to file an original bill in the

56. *Id.* § 326, at 265.
57. *Id.* §§ 333-338, at 269-74.
58. 3 E DANIELL, *supra* note 31, at 1654.
59. *Id.* at 1659.
60. *Id.* at 1660.
61. *Id.* at 1658-59.
62. *Id.* at 1660.
63. *Id.* at 1662. When a supplemental bill enabled the court "to give full effect to its decision" and when it sought to "vary the principle of the decree," this became a critical issue in enforcement proceedings. As the cases show, the addition of a new defendant alone would not render a postdecree supplemental bill invalid. If the bill brought in new parties *and* asked that new issues be litigated, however, it was not strictly supplemental. *See infra* notes 147-52 and accompanying text.
64. 3 E. DANIELL, *supra* note 31, at 1666 (emphasis omitted).
65. *Id.* at 1667 (emphasis added).
66. *Id.* at 1666-67.
67. *Id.*

nature of a supplemental bill, then the court viewed the case, in some ways, as beginning over:

> A new defence [sic] may be made, the pleadings and depositions cannot be made use of in the same manner as if filed or taken in the same cause, and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the Court to make a similar decree.[68]

In other ways, courts viewed the original bill in the nature of a supplemental bill as an extension of the original bill.[69] For example, if the interest of a defendant became vested in another party, then the benefit of the decree had to be obtained by an original bill in the nature of a supplemental bill unless more than one defendant was present. In those cases, the court considered the new bill merely supplemental.[70] As commentators noted, the distinction between these two bills was primarily a matter of form: even though the court viewed the case as beginning anew, it could allow the pleadings and depositions of the prior case to be used in the new proceeding.[71] In fact, as Justice Story noted, this bill was in effect more supplemental than original.[72]

3. Summary

Accordingly, a court of equity could assert jurisdiction over "auxiliary" or "supplemental" matters primarily in two situations. First, if an action was at law, a court of equity could use its auxiliary powers to assist the parties to the action. The court could aid the judgment creditor by reaching equitable and intangible assets of the judgment debtor or by restraining and regulating the judgment. The court could also adjudicate claims to property in its custody.[73] Courts viewed an auxiliary bill as dependent on the action at law, even if new parties were

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68. *Id.* These distinctions were very technical and, as Daniell admitted, no general rule existed to determine when one or the other was applicable. *Id.* at 1667.

69. *See* 1 J. STORY, *supra* note 28, § 346, at 280-81.

70. *Id.* § 351, at 283.

71. *See* 3 E. DANIELL, *supra* note 31, at 1686-87. Daniell notes that "there does not seem to be any general rule . . . determining the cases in which the transmission of interest of the sole plaintiff renders the one or the other forms of proceeding applicable." *Id.* at 1667.

72. *See* 1 J. STORY, *supra* note 28, § 16, at 15.

73. *See, e.g.*, Johnson v. Christian, 125 U.S. 642, 645-46 (1888) (judgment debtor could seek injunction in equity so that he could assert defense not available in legal action); Freeman v. Howe, 65 U.S. (24 How.) 450 (1861) (parties asserting claim to property in custody of court had remedy in equity); Marsh v. Burroughs, 16 F. Cas. 800, 802 (C.C.S.D. Ga. 1871) (No. 9,112) (judgment creditor may file creditor's bill in equity to pursue equitable interest of judgment debtor).

named.[74] Second, if the primary action was in equity, the court had jurisdiction over dependent supplemental bills.[75] To determine if the supplemental bill was original or dependent, the court looked at the relationship of the parties to the main action and the relief sought.[76] Thus, to be dependent, a supplemental bill had to be connected to the subject matter of the primary claim. As argued below, both auxiliary and supplemental bills provided the federal courts with procedures for taking jurisdiction over claims related to the primary action and for maintaining their jurisdiction over an action until the judgment was satisfied.[77]

B. Nineteenth-Century Ancillary Jurisdiction

When the framers of the Constitution vested equitable judicial power in the Supreme Court and Congress provided that these powers were to be exercised uniformly throughout the federal system, a conflict between the limited jurisdiction of the federal courts and the exercise of their equitable powers was inevitable. Equity, with its emphasis on inclusiveness and liberal joinder of parties and claims, sometimes directly contradicted the limitations placed on federal jurisdiction by the Constitution and by the Congress.[78] Consequently, a federal court sitting in diversity could be faced with the choice between doing complete justice as equity demanded or dismissing the case for lack of jurisdiction. However, nineteenth-century federal courts managed to develop an accommodation between these two competing demands by utilizing the traditional distinctions found in equitable jurisdiction and

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74. The function of the auxiliary creditor's bill was to reach the equitable assets of the judgment debtor held by third parties. Thus, claiming that one was not a party to the underlying action was not a defense to this type of action. *See Marsh*, 16 F. Cas. at 800.

75. *See, e.g.*, Root v. Woolworth, 150 U.S. 401 (1893) (supplemental bill may be used to enforce previous equitable judgment of federal court). In *Root* a court of equity had previously entered a decree against Root that established title in Morton. Woolworth, who took title through Morton, sought to enforce that decree against Root in this proceeding. *Id.* at 402-03. The Supreme Court held that the supplemental bill was properly brought because Woolworth claimed as an "*assignee of a party to the decree*" and, thus, should not be required to institute "an original or independent suit against Root." *Id.* at 411 (emphasis in original).

76. *See supra* notes 58-72 and accompanying text.

77. *See infra* notes 102-29 and accompanying text.

78. For example, § 11 of the Judiciary Act of 1789 required actions to be filed in either the district in which the defendant resided or the district in which he was found at the time the writ was served. Judiciary Act of September 24, 1789, ch. 20, § 11, 1 Stat. 73, 79 (1789). This provision could have greatly limited equitable joinder devices if the courts had not limited its scope to original actions. *See infra* note 86 and accompanying text.

procedure.[79]

1. *Ancillary Jurisdiction Before* Freeman v. Howe[80]

The earliest courts that confronted this issue used the equitable concept of auxiliary jurisdiction and the distinction between original and dependent bills to solve the problems presented by section 11 of the Judiciary Act of 1789.[81] Section 11 required diversity actions to be filed either in the district in which the defendant resided or in the district in which he lived at the time the writ was served.[82] On the other hand, equity permitted a defendant in a legal action to file an auxiliary bill to enjoin enforcement of the judgment.[83] Because the bill for an injunction had to be filed in the court that issued the decree, filing an auxiliary bill in these circumstances violated section 11.

Dunlap v. Stetson[84] illustrates this dilemma. The defendants in a prior legal action requested the court to enjoin the enforcement of the judgment. The plaintiff in the original action, who was the defendant in the equitable proceeding, argued that the suit should have been filed in Massachusetts, where he resided.[85] In an opinion by Justice Story, the court reasoned that because a bill to enjoin a judgment was auxiliary and dependent, it could be maintained in the court that had given the original decree. Thus section 11 did not apply.[86]

When facing subject matter jurisdiction questions, however, the

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79. *See infra* notes 102-29 and accompanying text.

80. 65 U.S. (24 How.) 450 (1860).

81. *See, e.g.*, Dunlap v. Stetson, 8 F. Cas. 75 (C.C.D. Me. 1827) (No. 4,164).

82. Judiciary Act of September 24, 1789, ch. 20, § 11, 1 Stat. 73, 79 (1789).

83. Defendants in legal actions were limited in the kinds of defenses they could assert. In the interest of justice, therefore, equity would provide the defendant a forum to assert certain defenses. Accordingly, the defendant could file a bill in equity to enjoin enforcement of the decree while he litigated his defenses. *See* Johnson v. Christian, 125 U.S. 642 (1888).

84. 8 F. Cas. 75 (C.C.D. Me. 1827) (No. 4,164).

85. *Id.* at 75-77.

86. *Id.* at 79-80. Story also rested this decision on an earlier Supreme Court case, Logan v. Patrick, 9 U.S. (5 Cranch) 288 (1809). *See* Dunlap v. Stetson, 8 F. Cas. 75, 80 (C.C.D. Me. 1827) (No 4,164). In *Logan* the Supreme Court resolved a jurisdiction question concerning a bill to enjoin a prior judgment filed in Kentucky, the state in which the complainant resided. The plaintiff filed for the injunction in Kentucky rather than in Virginia, the home state of the defendant. The Supreme Court merely stated that "there could be no doubt of the jurisdiction of the court below." *Logan*, 9 U.S. (5 Cranch) at 289. Story believed this case supported the ruling in *Dunlap*, but the opinion is so conclusory that it does not provide a useful example of the Supreme Court's reasoning on this issue. Story also pointed out that the rule was necessary to prevent a failure "of all equitable relief" in situations in which one party had become a citizen of the same state as the other during the course of the underlying action. *Dunlap*, 8 F. Cas. at 80.

Supreme Court originally was not as flexible as the *Dunlap* court had been when it faced the section 11 venue question. In *Simms v. Guthrie*[87] Chief Justice Marshall noted that a bill to enjoin a judgment was not an original bill and must be brought in the court that rendered the decree.[88] He remarked that the federal court's "limited jurisdiction might possibly create some doubts of the propriety of making citizens of the same state with the plaintiff parties defendants."[89] If the parties were not diverse, "the Court [could] dispense with parties who would otherwise be required, and decree as between those before the Court, since its decree [could not] affect those who [were] not parties to the suit."[90] Despite this limiting language, later courts relied on *Simms* to justify ignoring the strict requirements of diversity in an injunction action, focusing instead on Chief Justice Marshall's view of the bill as dependent and not original.[91]

The courts eventually applied the concept of auxiliary jurisdiction and the distinction between original and dependent bills to resolve subject matter jurisdiction problems. Two early Supreme Court cases presented similar fact situations.[92] In *Dunn v. Clarke*[93] the Court considered a subject matter jurisdiction question when a plaintiff who had obtained a judgment at law in a circuit court died before the court executed the judgment.[94] The Court determined that the circuit court had jurisdiction over an action to stay the judgment, even though the deceased party's representative and the original defendants were all citizens of Ohio. The Court reasoned that the injunction bill was not an original bill and that "no change in the residence or condition of the parties can take away a jurisdiction which has once attached."[95]

The Court limited the action that could be taken by the circuit

87. 13 U.S. (9 Cranch) 19 (1815).

88. *Id.* at 25.

89. *Id.*

90. *Id.*

91. *See, e.g.*, St. Luke's Hosp. v. Barclay, 21 F. Cas. 212, 213-14 (C.C.S.D.N.Y. 1855) (No. 12,241) (bill to enjoin action at law auxiliary to underlying action may be maintained in absence of diversity).

92. *See* Clarke v. Mathewson, 37 U.S. (12 Pet.) 164 (1838); Dunn v. Clarke, 33 U.S. (8 Pet.) 1 (1834). A federal circuit court addressed this question earlier and reached the same result. *See* Penn v. Klyne, 19 F. Cas. 166 (C.C.D. Pa. 1817) (No. 10,936) (*scire facias* to revive a judgment is a continuation of the original action and may issue in the name of plaintiff's legal representatives, even though they are citizens of the same state as the defendant).

93. 33 U.S. (8 Pet.) 1 (1834).

94. *See id.* at 2. The original plaintiff was a citizen of Virginia who brought an action in ejectment against several citizens of Ohio. The defendants below filed an action against the deceased plaintiff's representative for an injunction to stay execution of the judgment. *See id.*

95. *Id.*

court, however, on the ground that new parties who were not defendants to the original action had been brought into the action. While "[t]he injunction bill is not considered an original bill between the same parties, as at law . . . if other parties are made in the bill, and different interests [are] involved, it must be considered, to that extent at least, an original bill."[96] To the extent the bill was an original bill, "the jurisdiction of the circuit court must depend upon the citizenship of the parties."[97]

In *Clarke v. Mathewson*[98] the plaintiff filed suit in equity and requested an accounting of certain transactions between the parties, but died after the case was referred to the master.[99] His administrator, Clarke, filed a bill of revivor.[100] The circuit court viewed the bill of revivor as an original bill and ruled that it did not have jurisdiction. The Supreme Court reversed and held that the bill of revivor was a continuation of the original suit, not an original bill. As Justice Story noted:

> [I]n courts of equity, an abatement of the suit, by the death of a party . . . amounts to a mere suspension, and not to a determination of the suit. It may again be put in motion by a bill of revivor . . . [which] is the mere continuation of the old suit . . . . [S]uch bills are treated not strictly as original bills, but as supplementary or dependent bills, and [are] so properly within the reach of the court . . . .[101]

Because the dependent bill in equity continued the prior action, the court's jurisdiction over it derived from its jurisdiction over the prior action.

2. Freeman v. Howe[102] *and its Progeny*

Although the distinction between an original and dependent bill was useful in some circumstances, the distinction could also complicate matters in situations that concerned new parties, as *Simms* and *Dunn* illustrate. Initially, the Supreme Court was unwilling to take jurisdiction over a dependent bill in equity if it brought new parties into the

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96. *Id.*

97. *Id.* The solution decreed by the Court was to stay proceedings in the circuit court until the parties could seek the relief they sought from a state court. *Id.* at 2-3. Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1860) expressly limited this aspect of the ruling.

98. 37 U.S. (12 Pet.) 164 (1838).

99. *Id.* at 170.

100. *Id.* Although the original plaintiff was a citizen of Connecticut, Clarke and the original defendants were citizens of Rhode Island. *Id.*

101. *Id.* at 171-72.

102. 65 U.S. (24 How.) 450 (1860).

action because it considered such bills to be original.[103] In two key mid-nineteenth-century cases,[104] however, the Supreme Court applied the rules of equitable procedure more flexibly than it had in *Dunn* and expanded the doctrine of ancillary jurisdiction to embrace situations involving new parties that destroyed strict diversity.

Freeman v. Howe[105] was the first of these key decisions and is often cited as the leading ancillary jurisdiction case of the nineteenth century.[106] In *Freeman* property was in the custody of a federal court as the result of an action at law.[107] The Supreme Court noted that the parties asserting a claim to the property, even though not diverse, could file a bill in equity to determine their rights:

> The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.[108]

The Court cited *Dunn v. Clarke*[109] and *Clarke v. Mathewson*[110] in support of this principle.[111] Moreover, the decision specifically limited that

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103. *See supra* notes 87-91 and accompanying text.

104. Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609 (1865).

105. 65 U.S. (24 How.) 450 (1860).

106. *See* 13 WRIGHT & MILLER, *supra* note 21, § 3523, at 87. While the federal courts before *Freeman* utilized auxiliary jurisdiction, *Freeman* was apparently the first case in which a court used the term "ancillary." For cases that predate *Freeman* and use auxiliary jurisdiction to bring nondiverse parties before the court, see St. Luke's Hosp. v. Barclay, 21 F. Cas. 212 (C.C.S.D.N.Y. 1855) (No. 12,241) (bill to enjoin an action at law was auxiliary to the underlying action, even though parties were not diverse) and Hatch v. Dorr, 11 F. Cas. 805 (C.C.D. Mich. 1846) (No. 6,206) (court allowed a creditor's bill to be maintained in the absence of diversity because it was a continuation of a former controversy).

107. *Freeman*, 65 U.S. (24 How.) at 453. The original plaintiff, a New Hampshire resident, filed suit against the Vermont and Massachusetts Railroad Company, a Massachusetts corporation, in the District of Massachusetts Circuit Court. The federal marshall, Freeman, attached a number of railroad cars as security for the satisfaction of a judgment, if one were rendered. The mortgagees of the railroad company filed an action for replevin in state court, and as a result, the local sheriff seized the railroad cars. *Id.*

108. *Id.* at 460.

109. 33 U.S. (8 Pet.) 1 (1834).

110. 37 U.S. (12 Pet.) 164 (1838).

111. *Freeman*, 65 U.S. (24 How.) at 460. The Court also rested its decision on the importance of the federal court's power to determine its own jurisdiction, stating that sending the parties to state court would give the state court the authority to determine the jurisdiction of the federal court. As the court argued, "no Government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its

aspect of the ruling in *Dunn* which required the additional parties to file their claims in state court.[112]

The second key decision was *Minnesota Co. v. St. Paul Co.*[113] This case arose out of a bill, brought by a defendant to the underlying action, that requested a construction of the lower court's decree. The circuit court apparently declined to exercise jurisdiction because the bill was brought by the defendant, contained new subject matter, brought new parties before the court and, thus, was technically an original bill in the nature of a supplemental bill.[114] The Supreme Court reversed and ruled:

> [T]he question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts.[115]

Because the party requested the circuit court to carry into effect its "real intention and decree," and the property in question was still within the court's control, the Supreme Court held that jurisdiction was proper.[116]

Both *Freeman* and *Minnesota Co.* demonstrate the Court's recognition of ancillary jurisdiction as a doctrine that could be used by a federal court sitting in equity. After these cases, the technical requirements of equitable procedure or a strict interpretation of the diversity requirement no longer limited jurisdiction.[117] Instead, the courts began to apply the flexible spirit of equity and ignore the requirements of strict diversity when faced with auxiliary and supplemental bills.[118] The federal courts were no longer "confined to the line which, in chan-

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judicial tribunals were subject to the determination of another." *Id.* at 459.

112. *Id.* at 460. Although *Freeman* specifically restricted *Dunn*, some later courts relied on *Dunn*'s limiting language when they declined to exercise jurisdiction. *See, e.g.*, Anglo-Florida Phosphate Co. v. McKibben, 675 F. 529 (5th Cir. 1894); Conwell v. White Water Valley Canal Co., 7 F. Cas. 372 (C.C.D. Ind. 1868) (No. 3,148).

113. 69 U.S. (2 Wall.) 609 (1864).

114. *Id.* at 624, 633-35.

115. *Id.* at 633.

116. *Id.* at 633-35.

117. In *Dunn* the Supreme Court required the additional parties to take their property claims to state court. Dunn v. Clarke, 33 U.S. (8 Pet.) 1, 2-3 (1834); *see also* Simms v. Guthrie, 13 U.S. (9 Cranch) 19, 25 (1815) (Chief Justice Marshall remarked that while a bill to enjoin a judgment at law must be brought in the same court that rendered the decree, parties who were citizens of the same state as plaintiffs could not be made defendants to the bill and, thus, the decree would not affect absent parties).

118. *See supra* note 106 (noting that some of the cases decided before *Freeman* anticipated its ruling).

cery pleadings, divides original bills from cross bills [sic] and supplemental bills, but [could] look to the essence of the matter, and to principles which, as regards parties, the federal courts have adopted in reference to their jurisdiction."[119]

This trend is illustrated in cases that concern the equitable joinder devices of cross-bills and bills of interpleader. If the federal courts had strictly applied the limits of diversity, these flexible devices would have had limited usefulness in the federal system. The courts would not have taken jurisdiction over a cross-bill filed by one defendant against another defendant from the same state. Similarly, a claimant could not effectively use a bill of interpleader in federal court if any of the claimants to the property had been citizens of the same state as the party that filed the bill. After *Freeman* and *Minnesota Co.*, however, courts used the original or dependent distinction to justify their jurisdiction over related claims, even if the assertion of the claim violated strict diversity.[120]

This flexible application of equitable procedure is also illustrated by auxiliary actions that concerned new parties. Parties that were strangers to the underlying legal action could file bills to enjoin the enforcement of a judgment after *Freeman* and *Minnesota Co.*, even if their presence destroyed diversity.[121] Moreover, ancillary jurisdiction allowed new parties to be brought before the court in enforcement proceedings.[122]

3. Summary

These early cases show that the nineteenth-century doctrine of ancillary jurisdiction originated in equity practice. If the federal courts

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119. Schenck v. Peay, 21 F. Cas. 667, 669 (C.C.E.D. Ark. 1868) (No. 12,450) (citations omitted).

120. For example, in *Schenk*, one defendant, Peay, filed a cross-bill against the other defendant, Bliss, and the plaintiff. Both defendants were citizens of Arkansas, but the court, citing *Freeman* and *Minnesota Co.*, took jurisdiction on the grounds that the bill (1) was necessary to Peay's defense, (2) had not brought new parties into the suit, and (3) made possible a complete determination of the controversy before the court. *Id.* at 669-70. Similarly, in Stone v. Bishop, 23 F. Cas. 154 (C.C.D. Mass. 1878) (No. 13,482), a federal court took jurisdiction over an action for interpleader because the bill was related to a legal action already before the court even though one party was from the same state as the bank that instituted the action. *Id.* at 154-55.

121. *See* Pacific R.R. v. Missouri Pac. Ry., 111 U.S. 505 (1884); Krippendorf v. Hyde, 110 U.S. 276 (1884); McDonald v. Seligman, 81 F. 753 (C.C.N.D. Cal. 1897); Thompson v. McReynolds, 29 F. 657 (W.D. Ark. 1887).

122. *See, e.g.*, Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329 (1987); Labette County Comm'rs v. United States *ex rel.* Moulton, 112 U.S. 217 (1884); Babcock v. Millard, 2 F. Cas. 298 (C.C.N.D. Ohio 1862) (No. 699).

were to function as courts of equity, exercise their auxiliary powers to aid actions at law, and promote the policies of equity by bringing all interested parties before the court, they had to circumvent the requirement of strict diversity in some cases. Thus, the court developed the rule that a dependent bill needed no independent basis of subject matter jurisdiction.[123] Once an original action was before the court, subject matter jurisdiction was established for all actions properly considered to be dependent.[124]

As long as an auxiliary bill concerned an underlying legal action, the courts generally viewed it as dependent.[125] In contrast, a bill supplemental to an equitable action was not so easily categorized.[126] Although courts used the terminology interchangeably and referred to bills as "dependent," "auxiliary," "supplementary," and "ancillary,"[127] the requirements differed, depending on whether the party filed a bill to aid an action at law or whether the party filed it to aid an action in equity.[128] In either case, the nineteenth-century federal courts generously interpreted the requirements for auxiliary and supplementary bills and allowed new parties to be brought before the court, even if their presence destroyed strict diversity.[129] The doctrine was limited, however, and the extent of the limitations became the primary issue in enforcement proceedings.

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123. If a bill was dependent, it did not have to include a jurisdictional statement alleging the citizenship of the parties. *See* Johnson v. Christian, 125 U.S. 642, 645-46 (1888).

124. *See* Howards v. Selden, 5 F. 465 (C.C.E.D. Va. 1880) (broad view of ancillary jurisdiction). Once a federal court properly acquired jurisdiction of a cause, the *Howards* court held that:

> [J]urisdiction then becomes that of a court of equity proper, and extends to embrace all acts which it is proper for a court of equity to perform in the cause before it; for where a court of equity has gained jurisdiction of a cause for one purpose, it may retain it generally for relief, such as a court of equity may properly grant in the ordinary exercise of its authority. Among these . . . a court of equity not only may but should do complete justice as between all parties before it . . . rather than compelling [them] to go out into another forum for their establishment . . . .

Id. at 474 (citations omitted).

125. The court developed distinct requirements for these bills. *See infra* notes 141-46 and accompanying text.

126. *See supra* notes 58-72 and accompanying text.

127. *See, e.g.*, Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861) (referring to bill in question as "*ancillary* and *dependent, supplementary* merely to the original suit, out of which it had arisen") (emphasis added).

128. *See supra* notes 73-77 and accompanying text.

129. *See supra* notes 121-22 and accompanying text.

C. *Ancillary Enforcement Jurisdiction*

1. *The Constitutional Basis of the Doctrine*

While the doctrine of ancillary jurisdiction generally was justified as necessary to the proper functioning of a court of equity, the doctrine of enforcement jurisdiction rested on the more specific and fundamental requirement that a court be able to enforce its judgments. As Justice Thompson noted in *Bank of the United States v. Halstead*,[130] "[t]he judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended" if a federal court could not enforce its judgments.[131] To ensure this power, the Supreme Court determined that "[t]he jurisdiction of a Court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied."[132] Thus, the "judicial power" that the Constitution vested in the federal judiciary included the power to enforce judgments.

Moreover, in the Process Acts,[133] Congress mandated that federal circuit courts adopt the modes of process used by the courts of the state in which the court sat.[134] As a result, "the forms of writs and executions and the modes of process and proceedings were the same, whether the litigation was in the State court or in the Circuit Court of the United States."[135] This did not mean, however, that the states could affect the operation of the federal courts by modifying their legal procedures.[136] The circuit courts were "wholly independent" from the courts of the states in which they sat.[137]

Thus, the judicial power encompassed the enforcement power and, as long as the court was sitting at law, state procedure provided the

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130. 23 U.S. (10 Wheat.) 51 (1825).

131. *Id.* at 53.

132. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 23 (1825); *see also* Payne v. Hook, 74 U.S. (7 Wall.) 425, 429-30 (1869) (The right to sue in diversity is of no value "if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress."); Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 187 (1868) ("[I]f the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.") (citation omitted); United States v. Drennen, 25 F. Cas. 908, 910 (C.C.D. Ark. 1845) (No. 14,992) ("An execution is said to be the end of the law, and it gives to the successful party the fruits of his judgment. If a court is competent to pronounce judgment, it must be equally competent to issue execution to obtain its satisfaction.") (citations omitted).

133. Process Act of September 29, 1789, ch. 21, 1 Stat. 93 (1789), *amended by* Process Act of May 8, 1792, ch. 36, 1 Stat. 275 (1792).

134. For a discussion of the Process Act's provision for uniform federal equity procedure, see *supra* note 25 and accompanying text.

135. *Riggs*, 73 U.S. (6 Wall.) at 191.

136. *See Wayman*, 23 U.S. (10 Wheat.) at 41.

137. *Riggs*, 73 U.S. (6 Wall.) at 196.

method used to exercise that power.[138] Legal actions in aid of a judgment at law were continuations of the prior action.[139] If the judgment could not be satisfied in a legal action, then the judgment creditor could resort to the ancillary remedy of an auxiliary action in equity.[140] This ancillary remedy could bring parties before the court that held any equitable interest of the judgment debtor.[141] Moreover, because the enforcement proceeding was a continuation of the prior action, the court did not require diversity of citizenship or the jurisdictional amount.[142]

A federal court's ancillary jurisdiction to enforce its judgments was not without limits. First, the doctrine was strictly limited to the court that rendered the decree.[143] Second, if the judgment was awarded in a legal action, the plaintiff had to be unable to satisfy the judgment at law before he could invoke equitable remedies.[144] Third, the enforce-

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138. As noted above, federal equity procedure was uniform throughout the federal judiciary. *See supra* note 25 and accompanying text.

139. *See, e.g., Wayman*, 23 U.S. (10 Wheat.) at 23. Legal actions to enforce judgments included the writs of execution, *fieri facias*, attachment and garnishment. These writs were usually viewed as "auxiliary" to the main action, even if the rights of third parties became involved. *See* First Nat'l Bank v. Turnbull, 83 U.S. (16 Wall.) 190 (1872) (dispute with third party over ownership of property levied on by sheriff was held auxiliary to original action and hence not a separate and independent litigation removable to federal court); Gwin v. Breedlove, 43 U.S. (2 How.) 29 (1844) (a writ of attachment not an independent suit, but was incidental to the execution of the judgment so that allegation of citizenship was unnecessary to the jurisdiction of the court); Pratt v. Albright, 9 F. 634 (C.C.E.D. Wis. 1881) (postjudgment proceedings in garnishment auxiliary to prior action and not removable to federal court). *But see* Tunstall v. Worthington, 24 F. Cas. 324 (C.C.D. Ark. 1853) (No. 14,239) (under Arkansas garnishment statute, proceeding must be seen as an independent civil suit which requires diversity of citizenship).

140. *See* Case v. Beauregard, 101 U.S. 688 (1879). In *Case* the Court held that if the debtor's ownership interest is merely equitable, the court does not have to require "fruitless" attempts to reach it by legal means. *Id.* at 691.

141. *See* Marsh v. Burroughs, 16 F. Cas. 800, 802 (C.C.S.D. Ga. 1871) (No. 9,112); *see also* Labette County Comm'rs v. United States *ex rel.* Moulton, 112 U.S. 217 (1884). In *Labette County* the Supreme Court approved the use of a writ of mandamus to require a governmental entity that was not a party to the original action to pay a judgment. The party had a duty to pay under the statutes of the State of Kansas. The Court noted that "it does not follow because the jurisdiction in mandamus is ancillary merely that it cannot be exercised over persons not parties to the judgment sought to be enforced." *Id.* at 221. The Court reasoned that the real question was whether the county commissioners, to whom the writ was addressed, had a legal duty to pay the judgment. *Id.* The Court noted that if a duty existed, "then they are, as here, the legal representatives of the defendant in [the judgment already obtained], as being the parties on whom the law has cast the duty of providing for its satisfaction." *Id.*

142. *See* Dugas v. American Sur. Co., 300 U.S. 414 (1937).

143. *See* Claflin v. McDermott, 12 F. 375 (C.C.S.D.N.Y. 1882); Winter v. Swinburne, 8 F. 49 (C.C.E.D. Wis. 1881).

144. *See* Judiciary Act of September 29, 1789, ch. 20, § 16, 1 Stat. 73, 82 (1789)

ment proceeding had to be a mere continuation of the prior action, not an action based on new grounds.[145] However, the presence of a new party did not by itself relieve the court of jurisdiction.[146]

2. *Application of the Doctrine*

These rules were not always easily applied. For example, in *Buford & Co. v. Strother & Conklin*[147] the court, facing three requests for removal of garnishment actions[148] from state to federal court, struggled to formulate a method by which those enforcement proceedings, or "supplemental proceedings," which were merely continuations of the prior action could be distinguished from those that were separate and independent.[149] The court remarked:

> It is idle to say that a supplemental proceeding cannot be removed because it is an appendage or sequence of the original suit. This is, at best, but reasoning in a circle. It is as if one were to affirm that a supplemental proceeding cannot be removed because it is a supplemental proceeding.[150]

The court determined that, as long as the supplemental proceeding was simply a "mode of execution or of relief that was inseparably connected with the original judgment or decree," it was not a separate action, even though a new controversy might arise between the judgment creditor and a third party.[151] If the supplemental proceeding raised an independent controversy with a new party, rather than merely seeking to execute the judgment, then it was held a separate action and hence removable to federal court.[152]

Of the three cases faced by the court in *Buford*, the court adjudged only one to be proper for removal. In that case the plaintiff had

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(limits the equitable jurisdiction of the federal courts to situations in which no adequate legal remedy exists). The federal court could take jurisdiction in equity even though a judgment creditor might have a legal remedy in state court. *See, e.g.*, United States v. Howland & Allen, 17 U.S. (4 Wheat.) 108 (1819) (The Circuit Court of Massachusetts had jurisdiction of an equitable bill filed against debtors of the judgment debtor, even though a legal remedy existed in state court.). Moreover, if legal remedies would be obviously unproductive, the judgment creditor was not required to pursue them. *See, e.g.*, Case v. Beauregard, 101 U.S. 688 (1879).

145. *See* Anglo-Florida Phosphate Co. v. McKibben, 65 F. 529 (5th Cir. 1894).

146. *See* Pacific R.R. v. Missouri Pacific Ry., 111 U.S. 505, 522 (1884).

147. 10 F. 406 (C.C.D. Iowa 1881).

148. *See supra* note 11 and *infra* note 183 (discussing the split between the federal courts on the issue of whether garnishment actions are separate for removal purposes).

149. *Buford & Co.*, 10 F. at 406-10.

150. *Id.* at 407.

151. *Id.*

152. *Id.*

an unsatisfied state court judgment against a corporation and subsequently brought an action for fraud against a director and a stockholder of the corporation. The court noted that the plaintiff did not merely seek to reach the assets of the corporation that were in the hands of the defendant. Rather, he brought a "distinct and independent" claim against those defendants.[153] The claim, if proved, would have established "a new liability against these new parties."[154]

3. *Summary*

The cases show that the addition of a new and nondiverse party in an enforcement proceeding was permissible as long as the enforcement proceeding was limited to enforcing the prior judgment.[155] If the plaintiff's only claim against the third party concerned assets of the judgment debtor held by that third party, then the enforcement proceeding was a "mere mode of execution" and, thus, a continuation of the original action.[156] If the plaintiff sought to use the enforcement action to raise a new claim that was unrelated to those assets against the new party, however, the enforcement action was no longer a continuation of the main action.[157] It became an original action and thus required a separate basis for federal jurisdiction.[158]

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153. *Id.* at 409-10.

154. *Id.* at 410.

155. *See* Dugas v. American Sur. Co., 300 U.S. 414 (1937).

156. *See* Buford & Co. v. Strother & Conklin, 10 F. 406, 408 (C.C.D. Iowa 1881) ("[T]he process of garnishment after judgment is clearly a mode of *execution*. Its purpose is to obtain satisfaction of the judgment out of the debtor's effects which may be in a third person's hands.").

157. *See id.* at 409. Another example of this distinction is found in Anglo-Florida Phosphate Co. v. McKibben, 65 F. 529 (5th Cir. 1894). In *Anglo-Florida Phosphate Co.* the plaintiff in a diversity action asked for an accounting of a partnership's assets. After he received a favorable ruling in the initial action, he attempted to adjudicate by supplementary proceedings the title to a parcel of land that the defendant partners sold before the filing of the action for an accounting. Because the supplemental bill named the new owners of the property as new parties and asserted the new theory of relief that the transfer of property was detrimental to the partnership, the court viewed the bill as original and not dependent. Moreover, because one of the new parties and the plaintiff were both citizens of Florida, the court held that federal jurisdiction was not proper. The court was concerned that the plaintiff had attempted to circumvent the diversity requirements by declining to name the Florida party in the original action, even though the sale had already taken place when he filed the original law suit. *Id.* at 529-32.

158. *See* Dunn v. Clarke, 33 U.S. (8 Pet.) 1, 2 (1834) (requires diversity if an injunction bill is considered an original bill).

II. COMPARISON OF ENFORCEMENT JURISDICTION AND MODERN ANCILLARY JURISDICTION

Most scholars trace the development of modern ancillary jurisdiction to *Moore v. New York Cotton Exchange*,[159] a 1926 Supreme Court decision.[160] *Moore* may be viewed as a continuation of the line of nineteenth-century ancillary decisions. It was an action in equity, and the main claim, which was antitrust, was properly in federal court.[161] Moreover, the counterclaim arose out of the same transaction as the primary claim and was, therefore, presumably compulsory under the federal rules of equity.[162] In fact, the Court evidently relied on equitable principles: "[T]he relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court had held it could not have by judicial compulsion."[163]

Viewed in the context of nineteenth-century equitable principles and procedure, *Moore* appears unremarkable. However, *Moore* was not viewed in that context when the Supreme Court decided it. Instead, the early twentieth-century federal courts had developed a list of matters suitable for the ancillary jurisdiction of the federal courts.[164] The list enabled federal courts to assert ancillary jurisdiction "(1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon, or claims to, property in the custody of the court in the original suit."[165]

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159. 270 U.S. 593 (1926).

160. *See, e.g.*, 13 WRIGHT & MILLER, *supra* note 21, § 3523, at 93.

161. *See Moore*, 270 U.S. at 608-09.

162. *Id.* at 609.

163. *Id.* at 610.

164. The earliest use of this approach appeared in Julian v. Central Trust Co., 193 U.S. 93 (1904), in which the Supreme Court considered the ancillary powers of the federal courts to be (1) a bill of revivor continuing a prior litigation filed in the same court by the same parties or their representatives standing in the same interest; (2) a bill to enforce a judgment obtained in a prior suit filed in the same court by the same or additional parties standing in the same interest; (3) a bill filed to prevent a party from using the court for fraudulent purposes or to perpetuate an injustice; (4) a bill to obtain equitable relief connected with any judgment or proceeding at law rendered in the same court; and (5) a bill filed to assert any claim, title, or right to property in the custody of the court. *Id.* at 113-14 (citing 1 C. BATES, FEDERAL EQUITY PROCEDURE § 97, at 110 (1901)).

165. Campbell v. Golden Cycle Mining Co., 141 F. 610, 612 (8th Cir. 1905). The list loosely corresponds to the auxiliary powers of equity, that is, it delineates those areas in which equity could assist parties to a legal action. For some reason, the power of a federal court of equity to take jurisdiction of dependent supplemental bills in the absence of strict diversity is absent from the list. *See* Putnam v. New Albany, 20 F. Cas. 79 (C.C.D.

In one of the first cases to interpret *Moore*, *Lewis v. United Air Lines Transport Corp.*,[166] the court focused on the distinction between the three-part list of ancillary powers and the *Moore* ruling. After reciting the list, the court noted that before *Moore* "the scope of ancillary jurisdiction depend[ed] only upon the subject-matter of [the] supplemental proceeding."[167] In other words, if the ancillary claim concerned a matter on the list, federal jurisdiction was permissible. After *Moore*, ancillary jurisdiction included "any claim[s] arising out of the transaction which is the subject-matter of the suit."[168] In the *Lewis* court's view, the federal courts could now analyze the factual relationship between the primary action and the ancillary claim to determine if jurisdiction was proper.[169] Accordingly, after *Moore*, courts began to define ancillary jurisdiction in terms of the subject-matter of the lawsuit, not in terms of the three-part list.

In the context of the primary action, *Moore*'s same-transaction test provided a useful way to analyze the factual relationship of the ancillary claim to the main action. It was, in effect, a way to determine whether the bill was dependent or original, as equitable procedure required.[170] Thus, *Moore* at least indirectly followed the line of nineteenth-century ancillary jurisdiction cases. The requirement of fact relatedness, however, has no application to enforcement proceedings. Most actions to enforce money judgments against third parties are analogous to auxiliary actions in equity.[171] As noted above, auxiliary actions were considered to be dependent by their very nature.[172] Thus, they were part of the case or controversy as long as they were a continuation of the primary action. In effect, to apply the fact-relatedness test to enforcement actions confuses the auxiliary powers of equity

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Ind. 1869) (No. 13,482); Schenk v. Peay, 2 F. Cas. 667 (C.C.E.D. Ark. 1868) (No. 12,450).

166. 29 F. Supp. 112 (D. Conn. 1939).

167. *Id.* at 115. By "subject-matter" the court apparently meant "purpose," because the court believed that ancillary jurisdiction was limited to the three types of bills listed in *Campbell*. The court also asserted that "ancillary jurisdiction over the subject-matter may be obtained even though the supplemental proceeding brings in new parties." *Id.*

168. *Lewis*, 29 F. Supp. at 116 (The *Lewis* court erroneously attributes this quote, apparently from rule 30 of the Federal Equity Rules, to Cleveland Eng'g Co. v. Galion Dynamic Motor Truck Co., 243 F. 405 (N.D. Ohio 1917)). *See id.* at 115.

169. *Id.* at 116.

170. *See supra* notes 75-77 and accompanying text; *see also supra* notes 54-72 and accompanying text (discussing the distinction between dependent bills and original bills).

171. Today if a judgment creditor wants to reach the judgment debtor's assets, which are in the hands of third parties, he uses supplementary proceedings. Supplementary proceedings are a statutory enforcement method that takes the place of the creditor's bill in equity. *See supra* note 11.

172. *See supra* note 51 and accompanying text.

with the requirements of a supplemental bill in equity.

Moreover, the requirement of fact relatedness would unduly limit the jurisdiction of a federal court to enforce its judgments. In the typical enforcement proceeding, the judgment creditor is entitled to examine the assets of the judgment debtor, including those assets held by others.[173] Claims that the debtor has against third parties are normally unrelated to the subject matter of the lawsuit.[174] Thus, if the court applies the fact-relatedness requirement, these claims would almost never be properly brought in federal court. Under the Federal Rules of Civil Procedure, the federal courts have the same power to enforce their judgments as the courts of the states in which they sit.[175] If the courts apply the requirement of fact relatedness to enforcement proceedings, a federal court actually would have less enforcement power than the state court, because it would normally be unable to bring third parties into the enforcement proceeding.

If the enforcement proceeding is viewed as a dependent action, as "a mere mode of execution or of relief,"[176] then the court's subject matter jurisdiction depends on its jurisdiction over the primary action. Jurisdiction is proper as long as the enforcement proceeding is limited to enforcing the prior judgment, even if new parties are brought into the proceeding.[177] If the judgment creditor seeks to use the enforcement proceeding to litigate a new and independent claim against the

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173. *See* FED. R. CIV. P. 69(a); *see also supra* note 11.

174. For example, the third party might be an insurance company that contractually agreed to pay any claims against the judgment debtor in certain circumstances. The transaction litigated in the main lawsuit usually will have no factual relationship with the insurance contract. *Cf.* Berry v. McLemore, 795 F.2d 452 (5th Cir. 1986) (basis of the enforcement proceeding, an alleged oral contract between a police officer and his municipal employer, is different from the basis of the primary action, a § 1983 action against the officer).

175. *See* FED. R. CIV. P. 69(a); *see also* Blackburn Truck Lines, Inc. v. Francis, 723 F.2d 730 (9th Cir. 1984); Duchek v. Jacobi, 646 F.2d 415 (9th Cir. 1981); United States *ex rel.* Goldman v. Meredith, 596 F.2d 1353 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979); Gabovitch v. Lundy, 584 F.2d 559 (1st Cir. 1978); Chambers v. Blickle Ford Sales, Inc., 313 F.2d 252 (2d Cir. 1963); Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984); Mission Bay Campland v. Sumner Fin. Corp., 71 F.R.D. 432 (M.D. Fla. 1976); Nelson v. Maiden, 402 F. Supp. 1307 (E.D. Tenn. 1975).

176. Buford & Co. v. Strother & Conklin, 10 F. 406, 407 (C.C.D. Iowa 1881).

177. *See supra* notes 155-56 and accompanying text. If the third party challenges the existence of the debt, then the court must hold hearings to determine its validity. S.C. CODE ANN. § 15-19-290 (Law. Co-op. 1976) (South Carolina attachment statute provides that third party in possession of attached property may force trial on issue of his rights to that property). In fact, in some states, if the third party challenges the judgment creditor's right to property, the third party has a right to a jury trial. In *Berry* the district court's actions implied that the federal court should have jurisdiction over this type of action. *See Berr*, 795 F.2d at 454 (noting that the district court had held a jury trial on the garnishment claims).

third party, however, then a separate basis for jurisdiction must exist. The question presented is not whether the enforcement proceeding is factually related to the primary action, but whether the enforcement proceeding's purpose is to reach assets of the judgment debtor so that the judgment can be satisfied. Thus, if the purpose is limited, then the federal court has jurisdiction.

III. APPLICATION OF ENFORCEMENT JURISDICTION

This rule could have been usefully applied in three recent decisions by United States Courts of Appeals.[178] All three presented superficially similar situations. In each case the plaintiffs sought recovery in section 1983 actions against police officers and their municipal employers. All three courts rendered judgments against the officers, but exonerated the municipality of direct liability. Each plaintiff then sought to bring the municipality back before the court in the enforcement proceeding. At this point, the plaintiffs each asserted a different theory of municipal liability for the torts of employees.

A. Berry v. McLemore[179]

In *Berry* the plaintiff argued that officials of the Town of Maben, Mississippi, orally promised the defendant, McLemore, that the town would pay any judgment entered against him. The district court took jurisdiction over the dispute and awarded the town a directed verdict.[180] On appeal, the Fifth Circuit determined that the district court did not have jurisdiction because of lack of diversity.[181]

The court's opinion primarily rested on a procedural rationale. The plaintiff sought to use a writ of garnishment to enforce the judgment, and the Fifth Circuit considers garnishment actions against third parties to be separate and independent from the underlying action.[182] This rule, derived from *Butler v. Polk*,[183] illustrates the prob-

178. *See* Argento v. Village of Melrose Park, 838 F.2d 1483 (7th Cir. 1988); Skevofilax v. Quigley, 810 F.2d 378 (3d Cir.), *cert. denied*, 481 U.S. 1029 (1987); Berry v. McLemore, 795 F.2d 452 (5th Cir. 1986).

179. 795 F.2d 452 (5th Cir. 1986).

180. *Id.* at 453. The district court ruled that, under Mississippi law, the town could not be subject to a writ of garnishment, because Officer McLemore had not first obtained a judgment against the town. *Id.* at 454.

181. *Id.* at 455-56.

182. *Id.* at 455.

183. 592 F.2d 1293 (5th Cir. 1979). In *Butler*, a third-party, out-of-state insurer removed the garnishment action from state to federal court on the grounds that Mississippi courts considered garnishment actions to be separate suits. The Fifth Circuit held that removal was proper, not on the state law grounds, but on the grounds that other

lem with viewing all garnishment actions as separate from the main lawsuit. Under this view, even if the town did not dispute its responsibility to pay the judgment of its employee, the federal court still would not have been able to enforce the town's duty to pay; the garnishment action would be a separate and independent action under any set of facts and would, therefore, need a separate jurisdictional base. A rule that limits the enforcement power of a federal court to that extent is not justified by either case law or policy.[184]

The court would have reached a different result if it had applied the rules of enforcement jurisdiction. The plaintiff used a three-part argument. First, Berry argued that the town orally promised McLemore that it would pay any judgment against him. Second, he argued that, in reliance on the town's promise, McLemore did not seek independent counsel for the trial. Third, Berry contended that the attorney provided by the town had a conflict of interest at trial that adversely affected McLemore's interests.[185] When the plaintiff argued that the town had a contractual duty to pay McLemore's judgment, in effect, he was arguing that the town held an asset of the judgment debtor that could be used to satisfy the judgment. Therefore, the enforcement proceeding could have been viewed as a continuation of the prior action. Moreover, the detrimental reliance and conflict of interest claims against the town simply expanded the enforcement action to include new theories of the town's liability to McLemore.[186] As long as he limited these theories to the town's liability to the judgment debtor, however, jurisdiction should have been proper.[187]

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federal courts considered garnishment actions to be separate. *Id.* at 1295-96.

Whether garnishment actions can be characterized as separate for removal purposes is a question that has received uneven treatment from the federal courts. For a review of the cases, see 1A J. MOORE, B. RINGLE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.167[12] (2d ed. 1989) [hereinafter MOORE'S FEDERAL PRACTICE]; Annotation, *What Constitutes Ancillary, Incidental, or Auxiliary Causes of Action, So As to Preclude Its Removal from State to Federal Court*, 18 A.L.R. FED. 126 (1974); Annotation, *Removability to Federal Court of Garnishment Proceedings*, 22 A.L.R.2d 904 (1952). The Supreme Court has not recently addressed this question, but both policy considerations and existing Supreme Court precedents militate against a per se rule of separateness. *See* Barrow v. Hunton, 99 U.S. 80 (1879); First Nat'l Bank v. Turnbull & Co., 83 U.S. (16 Wall.) 190 (1873); *cf.* Bondurant v. Watson, 103 U.S. 281 (1881) (after recovering judgment against uncles for a share of a plantation, plaintiff-grandson brought an action against third party who had purchased a parcel of the subject property; this action held separate and independent from original lawsuit).

184. *See supra* note 183.

185. Berry v. McLemore, 795 F.2d 452, 453 (5th Cir. 1986).

186. *See id.* at 455.

187. The court should have jurisdiction to reach even intangible assets and rights of the judgment debtor in an enforcement proceeding. *See* Ager v. Murray, 105 U.S. 126 (1881). *See also* 9 T. EISENBERG, DEBTOR-CREDITOR LAW ¶ 37A.11[B], at ¶¶ 37A-115

The plaintiff argued that the court had ancillary jurisdiction to enforce its judgment and the *Berry* court responded with an ancillary analysis: "We can find no case where a court held that it had ancillary jurisdiction to consider claims in a *new and independent action* merely because the second action sought to satisfy or give additional meaning to an earlier judgment."[188] Having decided that all garnishment actions are independent, the court could not find the action to be ancillary without contradicting itself.[189] In an attempt to explain its reasoning, however, the court noted that because the enforcement action was in contract while the original action had been in tort, "the basis of the garnishment proceedings and the basis of the claim against McLemore are different."[190] Thus, even if the garnishment action had not been an independent action, and even if the town did not dispute its responsibility to pay the judgment, the court would not have taken jurisdiction under its fact-based ancillary analysis.

If the court had applied the equitable principles of enforcement jurisdiction, it would have focused on the relationship of the third party to the judgment debtor's assets, not on the relationship of the claims in the two proceedings. As it stands, the precedent set by *Berry* is troublesome: under its view of garnishment actions and of ancillary enforcement jurisdiction, federal jurisdiction over a nondiverse third party would never be proper in a garnishment action, even if the third party had an undisputed duty to pay the federal court judgment.

B. Skevofilax v. Quigley[191]

In *Skevofilax* the Township of Edison's obligation to pay the police officers' judgment also rested on contractual grounds. In this case, the contract was written and unambiguous.[192] The Third Circuit rested

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through -118 (1989); Annotation, *Judgment Debtor's Personal Injury Claims Against Third Person or Latter's Liability Insurer As Subject to Creditor's Bill*, 51 A.L.R.2d 595 (1957). Because a court has jurisdiction to enforce the judgment, however, does not mean that the state law in question provides a way to reach the assets the plaintiff seeks. For example, in many jurisdictions, including Mississippi, unliquidated claims are not subject to garnishment. *See, e.g.*, Bates v. Forsyth, 69 Ga. 365 (1882); Dibrell v. Neely, 61 Miss. 218 (1883); Friedman v. Mandelbaum, 25 N.J. Misc. 157, 51 A.2d 260 (1947); Lomerson v. Huffman, 25 N.J.L. 625 (1856); Barber v. Esty, 19 Vt. 131 (1847). Consequently, the district court judge held that Berry's attempted garnishment of McLemore's contract claim against the Town of Maben was improper. *See Berry*, 795 F.2d at 454.

188. *Berry*, 795 F.2d at 455 (emphasis in original).

189. *See* 1A MOORE'S FEDERAL PRACTICE, *supra* note 182, at ¶ 0.167 [12].

190. *Berry*, 795 F.2d at 455.

191. 810 F.2d 378 (3d Cir.), *cert. denied*, 481 U.S. 1029 (1987).

192. The township had a collective bargaining agreement with the police union, which provided that "[i]n the event of a judgment against a member of the bargaining

its decision that jurisdiction was proper on the Federal Rules of Civil Procedure. Because the court believed that New Jersey procedure provided a way to proceed against the township in this situation, it found jurisdiction under Rule 69(a).[193] As an alternative, the court reasoned that when the police officers joined plaintiff's motion to enforce the judgment, in effect, they made a Rule 13(g) cross-claim against the town.[194] Thus, jurisdiction could rest on the court's ancillary power to hear such a claim.

The dissent attacked the majority's Rule 69 reasoning. First, the dissent argued that New Jersey procedure did not consider an action for garnishment to be part of the original proceeding unless the debtor admitted the debt.[195] If the debtor denied the debt, as the town did in this case, state law required a new and independent proceeding to be filed.[196] As the majority's discussion of Rule 69 implied, however, the dissent's analysis failed to take into account that the Rules can neither confer nor take away subject matter jurisdiction.[197] Although Rule 69 incorporates state procedure for the purpose of enforcing judgments, state procedure cannot deprive a federal court of jurisdiction.[198]

Judge Becker concurred with the majority opinion, but argued that it was too broad: "[It] appears to assume the broad proposition that a federal court has ancillary jurisdiction over any effort to enforce its judgments regardless of whether the adjudication of the defendant's claim for funds involves facts and defendants unrelated to the original dispute."[199] As an alternative to the majority's Rule 69(a) approach, he urged the application of the three-step unified theory and noted that the enforcement proceeding "required an analysis of the same factual

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unit arising out of or incidental to the performance of his duty, the Employer agrees to pay for said judgment or arrange for the payment of said judgment." *Id.* at 379. The court determined in the underlying action the one condition precedent to its application, whether the judgment arose out of the performance of the police officer's duty. Thus, the township did not argue that any factual issues were in dispute. Instead, it argued that the indemnity clause was void under New Jersey law. *Id.* at 380.

193. *Id.* at 383-85. The court correctly noted that, under "[r]ule 69 the same relief is available in federal court for the satisfaction of a federal court judgment as would be available in a state court. Rule 69 does not contemplate that the holders of federal judgments must resort to state tribunals for their enforcement." *Id.* at 384.

194. *Id.* at 385-86.

195. *Id.* at 390-91.

196. *Id.* at 391 (Stapleton, J., dissenting).

197. *See* FED. R. CIV. P. 82, which provides in part that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

198. *See* Skevofilax v. Quigley, 810 F.2d 378, 384 (3d Cir.), *cert. denied*, 481 U.S. 1029 (1987) (New Jersey statutes that set forth procedures do not have "anything at all to do with federal court jurisdiction.").

199. *Id.* at 388.

events at issue in the principal litigation," that "no federal policy counsels against jurisdiction," and that interests of convenience, judicial economy, and fairness weighed in favor of jurisdiction.[200]

The difficulty with Judge Becker's analysis is that the question whether the collective bargaining agreement violated New Jersey public policy, which was posed by the enforcement proceeding, did not satisfy the "common nucleus of operative fact" test. It had no factual relationship to the section 1983 claim. Moreover, the question was primarily one of state law, concerning the type of state issues that federal courts usually are reluctant to address. In effect, Judge Becker's resolution of the jurisdictional question under the unified theory approach depended on how he framed the issues posed by the enforcement proceeding. Moreover, the result of his analysis is a rule that would not allow the federal courts to reach the judgment debtor's assets that are held by third parties unless that claim has a "sufficient nexus to the original dispute."[201] This rule is more limited than necessary.

If the court had applied the principles of enforcement jurisdiction, the analysis would have focused on the purpose of the action against the township: did the township hold assets of the judgment debtor, or did the plaintiffs seek to add a new and independent theory of liability to their claim. In this case, a collective bargaining agreement provided that the township would be responsible for any judgment against a police officer "arising out of or incidental to the performance of his duty."[202] Because the purpose of the action against the township was simply to enforce its contractual duty to the police officers, the court properly exercised jurisdiction.

C. Argento v. Village of Melrose Park[203]

In *Argento* state law obligated the municipal employer to pay the tort judgments of its employees. Its liability to the police officers was statutory and not contractual.[204] After reviewing *Berry* and *Skevofilax*,

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200. *Id.* at 389-90.

201. *Id.* at 388. Judge Becker stated: "Many enforcement actions are not truly ancillary. That the original parties pursue an action to provide the defendant with funds for satisfaction of the original judgment does not itself provide a sufficient nexus to the original dispute." *Id.*

202. *Id.* at 379.

203. 838 F.2d 1483 (7th Cir. 1988).

204. *Id.* at 1493. The Village of Melrose Park argued that the court did not apply the appropriate statute. *See id.* For enforcement jurisdiction purposes, however, which state indemnity statute applied was irrelevant: if the village owed a duty to the police officers under either statute, then they were a party that held an asset of the judgment

the court decided that to determine jurisdiction, the crucial issue was whether the enforcement action was a separate action. Under Illinois precedent, a party could have brought a claim to enforce the state employee indemnification statute in the primary action. Consequently, the court determined that an action enforcing that statute was not a separate action.[205] This rationale is flawed: even if the Illinois courts interpreted the statute to require an independent action, the federal court should not have denied jurisdiction on the basis of state law.[206]

If equitable enforcement principles had been used, the analysis would have been almost identical to the analysis in *Labette County Commissioners v. United States* ex rel. *Moulton*.[207] The issue in *Labette County Commissioners* was whether the applicable statute made the village "the part[y] on whom the law . . . cast the duty [to pay] the judgment."[208] Because it did, the enforcement proceeding was a mere mode of execution, not an attempt to bring a new claim against the village.

One problem in *Argento* was the wording of the state statute at issue. The statute provided that "[a] local public entity [is] empowered and directed to pay any tort judgment or settlement for which it or an employee while acting within the scope of his employment is liable."[209] The village argued that it was "not a third party indebted to the judgment debtor" because the statute made the village directly liable to the judgment creditor. Thus, the village argued, the case was improperly before the court.[210] The court declined to address this assertion because the parties did not raise it below and it was a procedural rather than a jurisdictional issue.[211]

When read literally, however, this statute could present problems of enforcement jurisdiction because an enforcement proceeding is not a dependent action if the judgment creditor uses it to assert a direct claim against the third party.[212] The statute's wording forces the judgment creditor into a direct claim posture and, thus, the enforcement proceeding appears to be independent. However, this view is superficial. The effect of the statute is to indemnify public employees. Although the wording of the statute makes the liability direct, it does not change the statute's effect. Under the statute the village was "the

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debtor and, thus, were properly before the court. *Id.*

205. *Id.* at 1487-90.

206. *See supra* notes 131-37 and accompanying text.

207. 112 U.S. 217 (1884). For a discussion of this opinion, see *supra* note 141.

208. *Labette County Comm'rs*, 112 U.S. at 221.

209. ILL. REV. STAT. ch. 85, para. 9-102 (1978) (amended 1986).

210. Argento v. Village of Melrose Park, 838 F.2d 1483, 1489 n.9 (7th Cir. 1988).

211. *Id.*

212. *See supra* notes 152-54 and accompanying text.

part[y] on whom the law . . . cast the duty [to pay the judgment],"[213] and jurisdiction over the village was proper.[214]

In dissent, Judge Manion applied the unified theory and argued that the state interests at stake far outweighed the interests of judicial economy or convenience to the litigants.[215] In his view, the case was analogous to *Berry*: "Plaintiff's claim sought to obtain new judgments against new parties based on new state law theories of liability—without any showing that the resolution of these matters in federal court would better serve the interests of the parties or the judicial system."[216]

The dissent's argument illustrates the inappropriateness of applying modern ancillary jurisdiction analysis to questions of enforcement jurisdiction. First, it ignores the strong federal policy that a federal court should have the power to enforce its own judgments. Second, by viewing the enforcement action as a separate action that raised only state law issues, the dissent asserted a rule that, if it had prevailed, would make enforcement of any federal court judgment against a nondiverse third party impossible, even if that third party's obligation to the judgment debtor was clear.[217]

IV. CONCLUSION

When a federal court takes jurisdiction over enforcement proceedings under Rule 69, the court's power may extend to a third party, as long as the proceeding is limited to reaching the judgment debtor's assets that are in the hands of the third party. Those assets may be intangibles such as contract rights or choses in action, and the third party may contest their ownership. If the proceeding is limited to adjudicating the liability of the third party to the judgment debtor, jurisdiction is proper. Only when the judgment creditor seeks to introduce

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213. Labette County Comm'rs v. United States *ex rel.* Moulton, 112 U.S. 217, 221 (1884).

214. If the wording of a statute could make its enforcement a new action, then the state legislature would have the power to limit the federal court's jurisdiction simply by making the duty to pay a tort judgment flow directly to the judgment creditor. This result is contrary to federal law. *See supra* notes 135-37 and accompanying text.

215. Argento v. Village of Melrose Park, 838 F.2d 1483, 1501-03 (7th Cir. 1988) (Manion, J., dissenting). He argued: "[t]he exercise of federal jurisdiction over these claims intrudes into Illinois' substantial interest in developing and applying its own law." *Id.* at 1502 (Manion, J., dissenting). If Judge Manion's view prevailed, enforcement proceedings would almost never be properly in federal court because most enforcement proceedings raise state law issues.

216. *Id.* at 1503 (Manion, J., dissenting).

217. Under rule 69, most federal court enforcement proceedings will raise only state law issues.

a new theory of the third party's direct liability to him does the enforcement proceeding become a separate action.

Although enforcement proceedings may be ancillary in the loose sense of the word, they are not suitable for analysis under the unified theory, which focuses on the factual relationship between the claim against the third party and the primary claim. Rather than focusing on fact relatedness, the court should merely inquire whether the third party has assets of the judgment debtor that can be used to satisfy the judgment. If so, then the enforcement proceeding is simply a continuation of the primary action and jurisdiction is proper.

When the Constitution vested judicial power in the federal courts and provided that judicial power would be exercised in both law and equity, it impliedly extended federal jurisdiction to enforcement proceedings. Thus, these proceedings are normally within the federal judicial power, not outside of it.[218] They are not ancillary as that term is used today, and to view them this way only confuses the issue, as *Berry*, *Skevofilax*, and *Argento* illustrate.

Susan M. Glenn

218. *See supra* note 5 and accompanying text.